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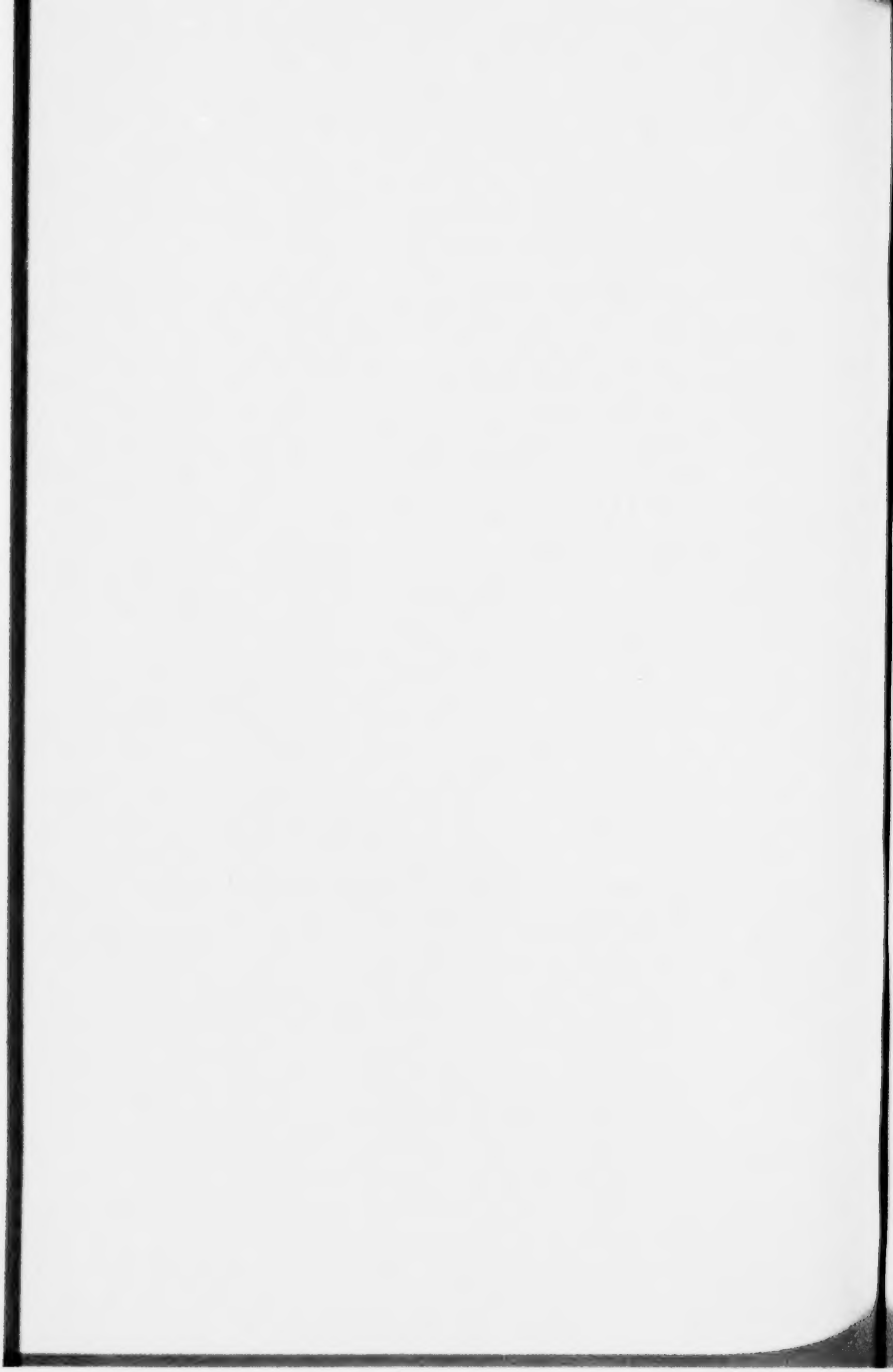

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 237

SVEN ANTONIOUS STEFFNER, PETITIONER

v.

JOSEPH SAVORETTI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1936, petitioner, a native of Sweden and a resident of the United States since 1920, was ordered deported after a hearing in California in which it was found that subsequent to his entry into the United States he had become a member of the Communist Party (R. 2, 15), and therefore should be deported in accordance with the then existing law. Section 2, Act of October 16, 1918, c. 186, 40 Stat. 1012.[1] He did not contest the

[1] At that time, Section 2 provided for the deportation of any alien who "at any time" after entry was found to have become a member of any organization or group that believed in, advised, advocated or taught the overthrow by force or violence of the Government of the United States.

validity of the order for his deportation (see R. 27) and he was deported on December 19, 1936 (R. 2). Prior thereto, in the early thirties, he had been convicted of petit theft, larceny, and transportation of a stolen automobile in interstate commerce (R. 6, 11).

In September 1945, petitioner arrived at Boston, Massachusetts, as a member of the crew of a Swedish ship. He was admitted as a seaman but deserted his ship and remained in the United States, although he did not have an immigration visa or any type of authority permitting his entry into this country as a permanent resident. After his entry he married his second wife, with whom he is living in Miami, Florida, where he works as a carpenter. After this marriage, in an effort to clarify his status, he voluntarily appeared before the United States Immigration authorities and thereafter filed a petition for suspension of deportation under 8 U. S. C. 155 (c), on the ground that deportation would result in economic detriment to his wife, an American citizen. (R. 4–5.) After a hearing held, before an immigration inspector at Miami, Florida, in 1947, at which petitioner appeared and was represented by counsel (R. 5, 14–15), an order for his deportation, dated August 26, 1949, was issued on the grounds (1) that he admitted having committed crimes involving moral turpitude prior to his 1945 entry into the United States, (2) that he was convicted of such crimes, (3) that at the time

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of entry he was not in possession of a valid immigration visa and not exempted from the presentation thereof, and (4) that he was an alien who had been deported and to whom the proper authority for readmission had not been granted (R. 11–12). During the course of the administrative proceeding, petitioner was at liberty under $500 bond (R. 6).

On November 22, 1949, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida challenging the validity of the order for his deportation (R. 1–9). He alleged that he was then at liberty on the bond posted in the deportation proceeding but expected to be imprisoned on November 23, 1949 (R. 1, 6). He claimed that the 1936 deportation order was invalid because, although he had been a member of the Communist Party in 1933, he was not a member in 1936 at the time those proceedings were instituted against him, and that under this Court's subsequent decision in *Kessler* v. *Strecker,* 307 U. S. 22 (1939), an alien who was not a member of a proscribed organization at the time of the institution of deportation proceedings was not deportable (R. 2–4).[2] Accordingly, he alleged, the third and fourth grounds upon which the 1949

[2] In the Alien Registration Act of 1940, c. 439, Title II, 54 Stat. 673, 8 U. S. C. 137, Congress amended the 1918 statute so as to make past membership a ground for deportation.

deportation order was based, i. e., that he entered the United States without proper authority, must fall (R. 2–3). Based upon the same hypothesis that his deportation in 1936 was illegal, with the result that he made no "entry" in 1945, but only in 1920, he also alleged that since the maximum sentence imposed upon him for his crimes was nine months' imprisonment, the 1949 order could not be sustained under the provisions of 8 U. S. C. 155 (a), which deal with deportation of aliens convicted of crimes committed after entry, or under the provision of the same section dealing with aliens who were convicted or admit the commission of crimes prior to entry (R. 6–7).[3] Finally, he alleged that the hearing before the immigration inspector did not meet the requirements of the Administrative Procedure Act (R. 5).

On November 22, 1949, the same date the petition was filed, the court issued an order to show cause, returnable at 9:00 a. m. on November 23

[3] The relevant portions of Section 155 (a) provide for the deportation of "* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * *" and of "* * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * *."

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(R. 9–10). In his return to the order to show cause, filed on November 23 (R. 10–13), the District Director of the Immigration and Naturalization Service alleged that petitioner was at liberty under a bond conditioned upon his delivery into the custody of an officer of the Service for deportation under a warrant of deportation and that the surety on the bond had been requested to deliver petitioner to the Service at 2:00 p. m. on November 23 for the purpose of deporting him pursuant to the order of August 26, 1949 (R. 12). The order was set forth in the return and it was prayed that the petition be dismissed so that the order could be executed.

On December 5, 1949, the District Court dismissed the petition, holding that petitioner was deportable in that he was convicted prior to his 1945 entry of a felony involving moral turpitude and that it was unnecessary to consider the other grounds for deportation (R. 17–18). The court enlarged petitioner "on bail" pending appeal (R. 18).

On appeal, the Government conceded that the hearing was not conducted in accordance with the Administrative Procedure Act and petitioner conceded that if his deportation in 1936 was valid, he is deportable (R. 27–28). The Court of Appeals decided that the 1936 deportation order was not subject to collateral attack in the present proceeding and that, in any event, the order was valid when entered. However, in accordance with this

Court's intervening decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, the judgment of the District Court was reversed and petitioner was remanded "to the custody of the Director of Immigration and Naturalization at Miami, Florida, for the resumption of deportation proceedings in accordance with the requirements of the Federal Administrative Procedure Act" (R. 30). Petitioner now seeks review of the Court of Appeals' decision sustaining the validity of the 1936 deportation order.

While we agree with the Court of Appeals that the 1936 order, which petitioner did not challenge, cannot now be challenged in this proceeding (cf., in addition to the cases cited by the court below, R. 28, *Sunal* v. *Large,* 332 U. S. 174, and *Warring* v. *Colpoys,* 122 F. 2d 642 (C. A. D. C.), certiorari denied, 314 U. S. 678) and that the order was valid when entered, we think it is unnecessary further to discuss these issues in the present posture of this case.

The Court of Appeals' judgment is interlocutory in nature and not a final judgment, since it did not dispose of the whole case. Cf. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 72; *Collins* v. *Miller,* 252 U. S. 364, 370. While it is true that this Court has power to grant certiorari to review interlocutory as well as final decrees of a court of appeals, *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418, this power is exercised only in "extraordinary cases," and the fact that the de-

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cree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258. Clearly, there are here no extraordinary circumstances or matters of urgent public interest such as to justify an exception to the general rule. The judgment of the Court of Appeals requires a new hearing and the making of a new record. It cannot be said with certainty that the result will be the same. "* * * the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation" (*Republic Gas Co.* v. *Oklahoma, supra,* at 71), e. g., the possibility of suspension of deportation.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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